IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1737 of 2003
WITH
CIVIL APPLICATION No 6519 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ABDUL HAMID HAJJI NOOR MOHAMMAD BALSANIA
Versus
ABDUL KHALIK NASIRUDDIN SHELIA

Appearance:
1. First Appeal No. 1737 of 2003
MR LR PATHAN for Petitioner No. 1
MR PV HATHI with MR MA SAPA for Respondent No. 1
..... for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 14/10/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. Admit. Mr. Sapa, learned advocate appearing for the respondent no. 1 waives service of notice of admission.

2. The appellant (original defendant no. 1) has filed this appeal u/S. 96 of the Code of Civil Procedure challenging the judgment and decree passed in Summary Civil Suit No. 3696 of 2001 for Rs.14,50,000/= alongwith interest at the rate of 6% p.a. from the date of the suit till realisation by order dated 26/12/2002.

3. The plaintiff filed a suit for recovery of Rs.14,50,000/= by inter-alia contending that plaintiff had booked two flats bearing nos. 501 and 506 in block "A" erected opposite Pushpak Building in Khanpur at Ahmedabad with the appellant (defendant no. 1). As the appellant had tried to transfer the flat no. 506 to third party after completion of the construction, the plaintiff filed a suit being Regular Civil Suit No. 2205/2000 and obtained injunction restraining the appellant from transferring the said flat. It appears that the settlement was arrived at in the said suit, whereby the appellant agreed to pay Rs.14,50,000/= against the cost of two flats and the plaintiff had forgone his rights. In compliance with the compromise the appellant had given 8 cheques all dated 31st January, 2001 of different amount issued by defendant no. 2 (present respondent no.2). As the cheques were bounced, the present suit is filed.

4. After the service of the summons, the plaintiff had applied for summons for judgment on 6/11/2001 on the same pleadings. The appellant after receipt of the notice for summons for judgment had applied for leave to defend. After hearing the parties, the learned Judge of the City Civil Court refused to grant leave to defend by holding that the defence set up by the appellant is illusory and passed a decree for Rs.14,50,000/= alongwith interest @ 6% p.a.

5. We have heard Mr. Pathan, learned advocate for the appellant as well as Mr. P.V. Hathi, learned advocate appearing with Mr. Sapa for respondent no. 1. Mr. Pathan submitted that the trial Court has committed an error in passing the decree for Rs.14,50,000/= straightway without appreciating that the appellant

raised question of triable issues and in any case the defence taken by the appellant is not sham and/or illusory. The appellant had raised the plea that five additional blank cheques had been given by the defendant no. 2 were blank and for mere satisfaction of the plaintiff in case the three cheques of total amount of Rs.6,25,000/= are not encashed and it reflects from the copy of the agreement itself that the figures of amount of all the five cheques are hand written including the total amount which is written after the deed was got executed. The very contention has been raised before the trial Court and the trial Court has dealt with the same by observing that -

> "It is not in dispute that the plaintiff has filed C.S. No. 2205/2000 against the defendant no. 1 and it is also not in dispute that compromise was arrived between the parties and compromise purshish is on record vide mark 3/18 and it is also not in dispute that pursuant to compromise one writing had also taken place and that writing is on record vide mark 3/19 and if that writing be read as it is, then it is clear that the defendant no. 1 had agreed to pay Rs.14,50,000/= to the plaintiff as per the details given in para. (A) of that writing and in paragraph (6) of leave to defend Exh. 20 that fact has been not denied and the defendant no. 1 who alleges that pursuant to compromise he was required to pay only Rs.6,25,000/- and that amount was filled in only in three cheques instead of eight cheques and that he objected that fact has failed to get filed the affidavit of Shri Ajimbhai and Mustaqbhai who were appointed as arbitrators and who are also one of the signatory in writing mark 3/19 and therefore considering the documentary evidence on record, I am of the view that the defendant no. 1 has not raised any triable issues for which unconditional leave should be granted. ...."

5.1. Needless to say that we are in total agreement with the reasonings of the learned trial Judge. Apart from the same, we also made sincere efforts to see to it that the dispute between the parties is resolved amicably. The respondent no. 1 (original plaintiff) suggested many formulas for arriving at overall settlement in the matter. It appears that the respondent no. 2, who is the son of appellant sought many adjournments to consult the appellant, but ultimately Mr. Pathan for the appellant has stated before us that the appellant is not inclined to accept suggestions of the

respondent no. 1. In any case, since we see no merit in this appeal, it is dismissed.

As the main appeal is dismissed, the Civil Application for stay does not survive and it is disposed of accordingly.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.